

LAW OFFICES

SHOOK, HARDY & BACON

REPORT ON RECENT ETS
AND IAQ DEVELOPMENTS

August 27, 1993

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— IN THIS ISSUE —

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

On August 6, 1993, the last day Congress was in session prior to its summer recess, four bills were introduced that relate to ETS and IAQ issues:

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- *H.R. 2985* Safe Cabin Air Quality Act of 1993, p. 1.
- *H.R. 2910* Risk Communication Act of 1993, p. 3.
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IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

103D CONGRESS

**[1] Kennedy Introduces New IAQ Bill in House;
Senate IAQ Bill Attracts Support from Carpet
Institute**

On August 6, 1993, Representative Joseph Kennedy II (D-Mass.) introduced a new indoor air quality bill (H.R. 2919) which supersedes the bill Kennedy introduced in April 1993. The latest proposal would require the EPA to promulgate guidelines for identifying and eliminating constituents of indoor air that are hazardous. Compliance with the guidelines would be voluntary. The EPA would also be required to disseminate public health advisories about "indoor air pollutants."

There is no reference to specific "pollutant" sources. Rather, the bill defines "indoor air hazards" as "a level of indoor air pollutants, or a condition that may result in a level of indoor air pollutants, that may be reasonably anticipated to adversely affect human health." Such conditions may include inadequate ventilation, intake of contaminated ambient air, microbial contamination, and indoor chemical sources. An "indoor air pollutant" is defined as "any substance or biological organism which is emitted or otherwise enters air other than ambient air."

In a departure from IAQ legislation previously introduced by Representative Kennedy, the measure does not authorize the appropriation of any specific sum to carry out its mandate. The bill Kennedy introduced in April called for \$47 million in spending over five years to fund indoor air research and other projects.

According to a press report, Kennedy also deleted provisions included in the previous bill that would have mandated action by agencies other than EPA. These provisions apparently were deleted to make sure the new bill would fall under the sole jurisdiction of

the House Energy and Commerce Committee. The previous bill had been mired in a total of three committees, none of which had held a hearing on the measure. For a discussion of the previously introduced Indoor Air Act of 1993 (H.R. 1930), *see* issue 47 of this Report, May 14, 1993.

Meanwhile, the Carpet and Rug Institute (CRI) reportedly has announced its full support of the Indoor Air Quality Act of 1993 pending in the Senate (S. 656). The president of CRI stated, "The Act requires that sound, peer-reviewed science be used to identify specific indoor air contaminants. Congress recognizes, as we do, that we can help consumers understand indoor air quality and how proper ventilation improves the indoor environment."

The bill, which was introduced by Senator George Mitchell (D-Me.), was approved by the Senate Environment and Public Works Committee on July 30. *See* issue 53 of this Report, August 6, 1993. Essentially a research bill, the measure would require the EPA to establish a national research program to study indoor air quality and its effects on human health, and to create a plan to reduce human exposure to those constituents of indoor air that pose a health hazard.

The CRI president acknowledged that carpeting can constitute "to a very small degree" an indoor air pollution source. He observed that the carpet industry is working aggressively to reduce carpet emissions through expanded labeling and testing programs. *See PR Newswire*, August 16, 1993; *BNA Washington Insider*, August 13, 1993.

► Update on carpet emissions lawsuit, Item 29.

[2] Legislation Introduced on Aircraft IAQ

On August 6, 1993, Representative Jerrold Nadler (D-N.Y.) introduced the Safe Cabin Air Quality Act of 1993 (H.R. 2985) on behalf of himself and Oregon Representative Peter DeFazio (D). The bill would require the administrator of the Federal Aviation Administration to issue regulations mandating (i)

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ventilation providing 20 cfm of fresh air per person in commercial aircraft cabins, (ii) a change of air filters when necessary, (iii) maintenance of a minimum standard of humidity, and (iv) the monitoring of ozone levels. The bill would also require the establishment of a toll free telephone number for reporting air travel related illnesses, and a quarterly report to Congress of the number and types of calls received.

In introducing the measure, Nadler observed, "[N]ow that the flying public no longer needs to be concerned about suffering the effects of secondhand smoke on short domestic flights, the airlines are creating a new problem for their passengers by restricting the amount of fresh air in the cabins of many new aircraft." The congressman referred to complaints by flight attendants and passengers about dizziness, dry eyes and contraction of contagious diseases. Nadler's bill has been referred to the Committee on Public Works and Transportation.

According to a press report, the Centers for Disease Control and Prevention are investigating the possible transmission of tuberculosis aboard airplanes in four cases. In addition, the union that represents flight attendants is reportedly pushing a proposal that would require OSHA to set airline cabin air quality standards. See *Chicago Tribune*, August 8, 1993.

[3] Appropriations Bill with PRO-FEDS Amendment Approved by Senate

On August 3, 1993, the Senate approved the appropriations bill (H.R. 2403) which had added Senator Frank Lautenberg's (D-N.J.) PRO-FEDS legislation by amendment. The measure was sent to a conference committee and conferees were appointed by voice vote. The matter will be considered when Congress reconvenes in September 1993. The PRO-FEDS legislation would restrict smoking in all federal buildings to separately ventilated areas.

Although no similar provisions are contained in the House version of the appropriations bill, the House has gone further than the Senate in restricting smoking in its own chambers and offices. Senate supporters of a government-wide ban are said to be cautiously optimistic that the House will go along with the amendment. See *The Washington Post*, August 4, 1993.

[4] Justice Ginsburg Gives Opinion About Smoking and Health

According to a press report, U.S. Supreme Court Justice Ruth Bader Ginsburg was asked during her confirmation hearing before the Senate Judiciary Committee whether the Constitution requires the government to subsidize pro-smoking campaigns to the same extent as anti-smoking campaigns. Ginsburg responded, "This is a question of safety and health, and I think the government can fund anti-smoking campaigns and it is not required to equally fund people who want to put their health and the health of others at risk." See *Associated Press*, July 23, 1993.

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

[5] *ETS Risk Assessment Litigation*: Briefing Schedule Established for Motion to Dismiss

September 20, 1993, is the current deadline for plaintiffs to respond to the EPA's motion to dismiss, according to a briefing schedule agreed to by the parties and ordered by the court. EPA's reply brief is due on October 20. For so long as the motion to dismiss is pending and the parties' only activity in the case is the briefing of the motion, the time for EPA to reply to plaintiffs' pending Requests for Admission is stayed.

EPA's motion to dismiss, filed in July, contends that the court has no jurisdiction over the subject matter of this action and that plaintiffs failed to state a claim upon which relief can be granted. See issue 52 of this Report, July 23, 1993.

Plaintiffs seek a declaration that the EPA Risk Assessment on ETS is null and void. Plaintiffs charge EPA with exceeding its statutory authority in conducting the risk assessment, using faulty science and improper scientific conclusions in classifying ETS as a Group A carcinogen, failing to follow its own risk assessment guidelines and violating due process. The six plaintiffs consist of three organizations related to tobacco growers, two cigarette manufacturers, and one cigarette vending machine operator. *Flue-cured Tobacco Cooperative Stabilization Corporation, et al. v EPA*, No. 6:93CV370 (U.S. District Court, Middle District, North Carolina) (filed June 22, 1993).

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[6] **Bill to Enhance EPA Credibility Introduced; House Subcommittee Holds Hearings on EPA Risk Assessment Policies**

On August 6, 1993, Representative Carlos Moorhead (R-Cal.) introduced a measure that would require the EPA Administrator to apply a series of principles designed to assure that risk assessments are "scientifically objective and inclusive of all relevant data." The "Risk Communication Act of 1993" (H.R. 2910) would apply to all risk assessments prepared under the auspices of the EPA.

The "principles" to be applied require the Administrator: (i) to explicitly distinguish scientific findings from other considerations affecting the design and choice of regulatory strategies; (ii) to consider both positive and negative laboratory or epidemiologic data and to discuss possible reconciliation of conflicting information; and (iii) to provide an explanation where the risk assessment process involves the selection of any significant assumptions, inferences or models and to identify any policy or value judgments.

The measure also provides principles for the characterization of risk in any risk assessment document, including a statement of the reasonable range of scientific uncertainty associated with any estimation of risk. Within two years after the date of enactment, the EPA Administrator would be required to review and revise any risk assessment already made by EPA when new information becomes available which would significantly alter prior results. The bill has been referred to the House Committees on Energy and Commerce, and Science, Space and Technology.

In other activities relating to risk assessment, a hearing was recently held before a House subcommittee. Witnesses reportedly suggested that EPA risk assessment policies be revised. Surveys of scientists and the media apparently revealed that the science of risk does not necessarily correlate with public perception of risk. For example, scientists consider tobacco, diet, excessive exposure to sunlight, ETS and workplace chemicals to be the most potent carcinogens. The media, however, in communicating information about cancer to the public, has apparently focused upon manmade chemicals, food additives, pollution, radiation, pesticides and hormone treatments.

According to one subcommittee witness, the failure of the media to convey expert assessments of risk to the

public can have broad policy implications. Although the EPA reportedly considers indoor air pollution to be among the top four environmental risks to health, the issue ranks near the bottom of budgetary priorities. Former general counsel to the EPA Donald Elliott stated during the hearing that the policy agenda will not be reordered until risk communication is improved. He recommended that risk assessment be presented as a range, rather than as a fixed figure.

Other recommendations made to the subcommittee included a proposal that an executive office develop broad policy considerations, that regulatory agencies develop the details of policy implementation and that a coordinating committee of environmental and risk-regulated regulatory agencies be formed. See *Indoor Pollution News*, August 6, 1993.

[7] **Audit Points to Lack of Focus and Insufficient Funding**

An article appearing in *Government Executive* discusses shortcomings of the EPA that it says will not be solved by elevating it to Cabinet level status. According to an audit of the agency by a Washington-based environmental think tank, the EPA is in crisis because it has been called upon to administer too many complex laws and lacks adequate funding. Critics of the agency also observe that EPA programs have tended to develop independently, resulting in a fragmented approach to environmental issues and problems.

Discussing the difficulties EPA has in keeping up with science, the article notes that its research and development budget has not grown adequately over the years. "EPA's scientific deficiencies also undermine its credibility," the article states, "prompting many accused polluters to sue. More than 600 lawsuits are pending against the agency." See *Government Executive*, July 1993.

[8] **Editorial by Rep. Durbin Appears in Tobacco Control**

This editorial, written by Representative Richard Durbin (D-Ill.), excoriates the tobacco industry for what Durbin refers to as diversionary tactics, misinformation campaigns and false claims regarding smoking and health issues. The editorial leads off with a reference to the EPA Risk Assessment on ETS, which

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Durbin says was applauded by the scientific and health communities "because its conclusions were fully supported by the evidence."

Also discussed in the editorial are Durbin's campaign to ban smoking on domestic air flights, the purported "special projects" research conducted by the Council for Tobacco Research, Judge Sarokin's opinion in *Haines v. Liggett Group*, and a report by Bero and Glantz which appears in the same issue of *Tobacco Control* and which contends that the tobacco industry has cited few peer-reviewed studies in attempting to refute the findings of the ETS risk assessment. The Bero and Glantz report is summarized in issue 53 of this Report, August 6, 1993.

Durbin is particularly concerned with tobacco industry claims that total indoor air quality issues must be addressed in the debate over ETS, and he states that the industry has argued "falsely, that a smoking ban would be ineffective in improving air quality [on airplanes] unless the hazards associated with other air pollutants were addressed first."

Durbin concludes, "I hope the American public will recognise the pattern and put as much faith in the tobacco industry's claims about ETS as it has put in the industry's claims about tobacco use." See *Tobacco Control*, Summer 1993. Durbin is the principal sponsor of the "PRO-KIDS" smoking restriction legislation currently pending in the House. (H.R. 710)

[9] "Statisticians Occupy Front Lines In Battle Over Passive Smoking," J. Bishop, *Wall Street Journal*, July 28, 1993

This article discusses the lawsuit filed against the EPA by tobacco interests and analyzes the controversy over the EPA's use of a 90 percent confidence interval in its Risk Assessment on ETS. The author observes that the validity of the ETS risk assessment is of concern to those with the authority to adopt smoking policies on the state, local and even individual levels. Scientists on both sides of the issue are quoted, and the author characterizes the coming courtroom battle as a "calculator-a-calculator" confrontation where statisticians "will present a series of arcane arguments about how much these unknowns affect the study's reliability."

An EPA consultant, interviewed for the article, observes that the 95 percent confidence interval was

not used in the ETS risk assessment precisely because it would have hinted that passive smoking actually reduces the risk of lung cancer. Such a hint would be meaningless and confusing because, according to the consultant, it is inconceivable that breathing in smoke containing "brown cancer-causing substances" could be health. He claims "[t]he confidence interval isn't a substantive issue." The tobacco industry's focus on it "is just to confuse the public."

U.S. OCCUPATIONAL SAFETY AND HEALTH AGENCY (OSHA)

[10] House Republicans Introduce OSHA Reform Legislation

Citing the need to reduce unnecessary governmental interference in job safety issues, House Republicans William Goodling (Pa.) and Harris Fawell (Ill.) introduced their version of OSHA reform legislation on August 6, 1993. (H.R. 2937)

The Republican measure, based largely on a proposal outlined in May 1992 by the late Rep. Paul Henry (R-Mich.), would expand federal occupational safety and health laws to cover Congress and state and local governments. It would also establish a single set of legal criteria for OSHA to consider in promulgating safety or health standards and would provide a partial exemption from OSHA inspections for those employers who have an on-site compliance officer or have an exemplary safety record. The bill would establish certain employer defenses to OSHA citations and would focus OSHA attention on the most hazardous industries and on those employers where most harm to employee health and safety has occurred. The bill would require OSHA to increase spending on educational, training and technical assistance programs, and would require the establishment of an award program to recognize exemplary programs in occupational safety and health.

House Republicans are reportedly seeking hearings on the measure that would be separate from hearings on the OSHA reform legislation introduced earlier this year by House Democrats (H.R. 1280), but a Democratic source has been quoted as saying that separate hearings are unlikely as a hearing on Henry's proposal was conducted during the last Congress. See *BNA Daily Labor Report*, August 10, 1993.

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[11] Task Force Ready to Forward Report on Reform Legislation

According to a press report, the Labor Department task force which has been studying proposed OSHA reform legislation (H.R. 1280, S. 575) still expects to forward its final report to Labor Secretary Robert Reich in September 1993. The task force was apparently set up following Reich's testimony before the House Education and Labor Committee in April of this year. Task force members are from several government agencies and have formed eight subgroups to review different issues raised by the proposed legislation.

Meetings to gather the opinion of interested organizations were reportedly held during the summer. Some 22 sessions in all were held. According to sources within the Labor Department, it is presently unclear whether the final report to Reich will contain specific recommendations for the department's position on the legislation or whether it will present a series of flexible options for addressing the Democratic-sponsored proposals. *See Daily Report for Executives*, August 18, 1993.

[12] Unions Seek TB Workplace Standard

Five labor unions filed a petition with OSHA on August 25, 1993, to request that the agency develop a tuberculosis standard. The unions are apparently concerned about the 20 percent increase in TB cases since 1985, which they say poses a threat to millions of employees in the workplace, particularly due to the emergence of a drug-resistant strain of TB. The safety of workers in the health care, social service and criminal justice fields are apparently of greatest concern. A survey of the Centers for Disease Control and Prevention (CDC) purportedly shows that TB has been transmitted to workers in 13 percent of all hospitals.

According to a press report, the petition seeks an exposure control plan that includes engineering controls such as improved ventilation, changes in work practices, use of personal protective equipment by workers and medical surveillance such as TB testing. *See Associated Press*, August 25, 1993.

An outline for a proposed standard to protect employees from tuberculosis in the workplace, developed by the union coalition, was previously sent to OSHA on December 21, 1992. The plan apparently includes much of California's proposed workplace TB standard.

OSHA reportedly acknowledged receipt of what it characterized as a petition, but has not as yet responded. According to an OSHA spokesperson, a TB guidance memorandum is currently being worked on, but it has not been released because the agency still has no administrator.

The coalition apparently sent a similar proposal to the CDC and requested that both CDC and OSHA immediately issue a joint advisory notice on protection from TB. The CDC reportedly adopted guidelines for preventing the transmission of TB in health care settings in 1990.

Other groups, such as the American Nurses Association (ANA), apparently favor a different approach, i.e., extensive worker education as an immediate remedy for employees at risk of contracting TB. According to the ANA, the effectiveness of any guidelines will depend upon early detection of the disease and effective treatment. *See OSHA Week*, August 16, 1993.

[13] Court Holds Hearing in Case Against Maryland OSHA

At a hearing on pre-trial motions held on August 20, 1993, Circuit Court Judge William McCullough reportedly indicated from the bench that he was inclined to dismiss this action, in which employees of three Maryland business establishments seek to force the Maryland Occupational Safety and Health Agency (MOSHA) to ban smoking in private workplaces. However, the judge did not issue a ruling on the merits of the defendants' motion for summary judgment, saying he would take it under advisement. He did rule, however, against a request to join the lawsuit that had been filed anonymously by racetrack employees. The judge apparently agreed with the assistant attorney general who argued that racetracks and business offices present "two different cases." *See Prince George's Journal*, August 23, 1993.

The named plaintiff in the case, Albert Ertel, works for General Electric in Rockville. GE offices are now smoke-free under an order issued by the corporation in January 1993, but Ertel apparently argues that his employer should be fined because it previously exposed workers to a "recognized hazard." The unnamed plaintiffs, whose attempts to intervene were denied, reportedly work for Rosecroft Raceway and Laurel Race Course. Spokespersons for those establishments had said that they are

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protecting nonsmokers by designating smoking areas in the clubhouse and would not impose total smoking bans unless ordered by the court.

Maryland's occupational safety and health plan was approved by the U.S. Secretary of Labor in 1973; thus, federal occupational safety and health laws are preempted in the state. Evidently, the complaint alleges that MOSHA standards require private employers to provide a workplace that is "free from each recognized hazard that is causing or likely to cause death or serious physical harm to the employee." The complaint also reportedly contends that "tobacco smoke is a recognized hazard to those who do not themselves partake of tobacco," and that 928 nonsmokers die each year in Maryland due to ETS exposure.

A state assistant attorney general reportedly said that MOSHA examined each of the three workplaces and found no evidence of violations of MOSHA policies. MOSHA also apparently determined that there was insufficient evidence of a health hazard to warrant a citation. MOSHA is defending the case on the ground that the courts can only order MOSHA to investigate charges but cannot order it to make specific findings. *Ertel v. Maryland Occupational Safety and Health Agency*, CAL 93-000-73 (Prince George's County Circuit Court) (filed 1992). See *Prince George's Journal*, August 5, 1993; *The Baltimore Sun*, August 20, 1993.

STATE AND LOCAL GOVERNMENTS

[14] Florida Mall Seeks Hearing on Smoking Ban

The manager of a Palm Beach County mall has reportedly asked for a public hearing on the state's plan to ban smoking in the common areas of indoor shopping malls. Although the 1992 Clean Indoor Air Act does not specifically mention malls among those venues where smoking will be regulated, the Department of Health and Rehabilitative Services has apparently interpreted the Act's definition of "public places" to include shopping malls. A hearing will be held in Tallahassee on August 30, 1993, and if a formal challenge to the Department's regulations follows, implementation of the regulations will be delayed while the case goes before a state hearing officer. See *Miami Herald*, August 19, 1993.

[15] ETS-Related State and Local Legislative Activities

• California

On August 19, 1993, A.B. 13 was reported from the Senate Committee on Judiciary with author's amendments. The bill was read a second time and amended, then re-referred to committee. As the bill stands now, it has been amended to allow smoking in bars, convention centers, large warehouses, card rooms, bingo centers, hotel lobbies and hotel bars not connected to restaurants.

Meanwhile, a competing bill, A.B. 996, was pulled from consideration by its sponsor, Assemblyman Curtis Tucker, Jr. (D-Inglewood), because of a lack of votes. Tucker's bill not only would have invalidated Los Angeles' restaurant smoking ban, but also would have allowed most business owners to set their own smoking policies. Withdrawal of Tucker's bill could prove to be temporary as provisions of it could resurface in the final hours of the session as an amendment to other legislation, or the bill could be revived next year. See *The San Diego Union-Tribune*, July 24, 1993, and *Los Angeles Times*, August 19, 1993.

• Local Governments in California

Huntington Beach. According to news reports, on August 3, 1993, the City Council approved an ordinance that will prohibit smoking in all restaurants by January 1, 1995. The ordinance takes effect September 1, 1993, and will require restaurant owners to set aside 75 percent of their space for nonsmokers until the full ban takes effect. Huntington Beach officials were reportedly concerned about reports of the alleged effects of ETS exposure. See *Orange County Register*, July 17, 1993, and *Los Angeles Times*, August 4, 1993.

Marin County. The County Board of Supervisors passed an ordinance that will go into effect in January 1994 that will prohibit smoking in county buildings and most public places. Bars that are not attached to restaurants are excluded. See *The San Francisco Chronicle*, August 18, 1993.

Santa Clarita. The City Council is expected to debate a proposed ordinance to prohibit smoking in enclosed workplaces as well as restaurants. According to the news report, if the ordinance becomes law, Santa Clarita would become the 49th municipality in California and the third in Los Angeles County to impose such a broad ban. "We

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have facts, undisputed reports showing that there is no safe level of secondhand smoke," an organizer of the antismoking drive is quoted as saying. *See Los Angeles Times*, August 17, 1993.

• **Local Governments in Colorado**

Denver. According to news reports, Denver is considering two antismoking bills. Councilwoman Kathy Reynolds introduced a bill to compete with one advanced by Mayor Wellington Webb's administration. Both bills were to be introduced to the full City Council on August 2.

The Mayor's proposal would ban smoking at all retail stores and outdoor public areas, including Mile High Stadium and Red Rock's Amphitheater. Reynolds' bill also would ban smoking in seating areas at the stadium and the amphitheater, but it would not ban smoking in other outdoor places. Reynolds' bill would not require workplaces to be smoke-free unless 50 percent of employees in a workplace sign a petition requesting such a change. Opponents to the bill addressed the City Council Committee, voicing their concerns that the ordinance would restrict personal liberties and public entrepreneurship. *See Rocky Mountain News and Denver Post*, July 22, 1993.

• **Local Governments in Louisiana**

Jefferson Parish. According to a news report, the Jefferson Parish Council may prohibit smoking in all public places, including restaurants and malls. Smoking is now prohibited in parish government offices. Parishes that don't adopt smoking restriction ordinances before September 1, 1993, are preempted from doing so by a state law. *See The Times-Picayune*, August 11, 1993.

• **Local Governments in Massachusetts**

Reading. The town has proposed to the Massachusetts Department of Public Health a program that would discourage and prohibit smoking. The proposal is an effort to get a share of the \$14 million that the department allotted for a state-wide antismoking campaign to encourage local boards of health to devise ways to reduce smoking. At least 11 other communities are also seeking some of the tax money from the tobacco control program. Larry Collins, a spokesman for the public health department, said about 24 percent of the population now smokes, and the goal is to cut that in half by the year 2000. The Reading program includes ways to eliminate ETS in the workplace and public places. *See The Boston Globe*, August 8, 1993.

• **Pennsylvania**

On April 28, 1993, Representative Mike Veon (D-Beaver County) introduced a package of worker health and safety bills that would, among other things, establish minimum indoor air quality and ventilation regulations. *See The Legal Intelligencer*, April 29, 1993.

• **Puerto Rico**

A law will reportedly go into effect at the end of the year in San Juan that will ban smoking in most restaurants as well as public buildings, schools, elevators, theaters, hospitals, day care centers, funeral homes, public parks and stadiums. *See USA Today*, August 9, 1993.

• **Local Governments in Tennessee**

Memphis. According to a news report, City Council members voted 13-0 to drop a proposed ordinance that would have prohibited smoking in restaurants, workplaces and most public buildings. One council member who had learned that the city already had a smoking ordinance stated that too much time has been spent debating a measure that was not needed. The current law requires designated smoking areas in some restaurants and workplaces. *See The Commercial Appeal*, July 28, 1993.

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[16] *Dunn*: Defendants Respond to Complaint

On August 12, 1993, defendants filed a variety of motions in response to the complaint. The cigarette manufacturing defendants, The Tobacco Institute and the Council for Tobacco Research filed a joint motion to dismiss and to transfer venue from the Superior Court of Delaware County, Indiana, to the Superior Court of Hamilton County. The parent company defendants individually filed motions to dismiss based on jurisdictional grounds. Plaintiffs are scheduled to respond to the motions on September 27, and defendants are to submit their reply briefs on October 27. The court is scheduled to hear argument on the motions on December 2.

Plaintiffs in this case contend that Mildred Wiley was a nonsmoker who died of lung cancer on June 24, 1991, as a result of her exposure to environmental tobacco smoke at her place of employment (a Veteran's Administration hospital) for the last seventeen years of her life. Her husband, Philip Wiley, is also claiming loss of consortium. Defendants in the case are each of the six major

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U.S. cigarette manufacturers, parent companies of three of the manufacturers, The Tobacco Institute, and the Council for Tobacco Research. *Dunn v. RJR Nabisco Holdings Corporation, et al.* (Superior Court, Delaware County, Indiana) (filed May 28, 1993).

[17] McKinney: Plaintiff Files Opening Appeal Brief

On August 5, 1993, plaintiff filed his opening brief in support of his appeal to the Nevada Supreme Court. Defendants' brief in opposition is currently due on September 7. In his brief, plaintiff contends the trial court abused its discretion in dismissing the case because it applied the court's time deadlines too strictly.

Plaintiff William McKinney, a prisoner in a Nevada jail, contended R.J. Reynolds and Brown & Williamson failed to warn of the health effects of ETS exposure. He alleged he has fairly general health problems caused by his exposure to ETS (emotional pain, severe headaches, itchy and watery eyes, recurring chest pains). *McKinney v. C.M. Products, Inc., et al.* (District Court, White Pine County, Nevada) (filed March 3, 1993).

McKinney also is the plaintiff in a civil rights case against Nevada prison officials regarding his exposure to ETS while incarcerated. On June 18, the U.S. Supreme Court remanded the case to the trial court to give McKinney an opportunity to try to prove his case. See issue 50 of this Report, June 25, 1993.

[18] Voth: Writ of Mandamus Filed

On August 2, 1993, U.S. District Judge Helen Frye denied plaintiff's motion to disqualify U.S. District Judge Robert Jones. On August 10, plaintiff filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals. The Ninth Circuit has not issued any rulings to date on the mandamus petition.

On August 6, Judge Jones granted plaintiff's motion for leave to amend his complaint and denied as moot defendants' motions to dismiss and for entry of judgment. Judge Jones also reopened discovery but subsequently granted R.J. Reynolds' motion for a stay of proceedings until the Ninth Circuit rules on the petition for writ of mandamus.

Frank Voth, incarcerated in the Oregon State Penitentiary, alleges that exposure to environmental tobacco smoke violates his civil rights. He claims he has "incurred

permanent health damage and is at risk of death" as a result of being exposed to environmental tobacco smoke. Defendants in *Voth* are Forsyth Tobacco Products, R.J. Reynolds and Brown & Williamson. *Voth v. Forsyth Tobacco Products, et al.* (United States District Court, Oregon) (filed April 27, 1993).

**ETS/IAQ LITIGATION NOT INVOLVING
CIGARETTE MANUFACTURERS**

WORKPLACE: WORKERS' COMPENSATION

[19] *Imamura v. City & County of Honolulu*, Case No. 29208149 (Hawaii Department of Labor and Industrial Relations, Disability Compensation Division) (decided March 12, 1993)

The director of Hawaii's Disability Compensation Division ruled that ETS exposure in the workplace was at least a partial cause of the claimant's adenocarcinoma of the upper right lung and, accordingly, awarded her workers' compensation benefits. The claimant, Sara Imamura, allegedly worked in close proximity to a number of cigarette smokers from 1963 to March 1992. Medical reports introduced in the case indicated that Imamura had no other exposure to ETS, and several doctors retained by claimant opined that the ETS exposure was a significant contributing factor to her development of lung cancer.

Dr. Dimitrios Trichopolous submitted a report in the case and stated in part: "If you have never been a smoker, there is a 50/50 chance that your lung cancer is due to your exposure to environmental tobacco smoke generated by your coworkers. . ." Dr. Elizabeth Fontham also submitted a medical report in which she stated that she and Dr. Pelayo Correa "found a 40-45% increased risk of lung cancer in nonsmoking women associated with *workplace exposures* from 16 to 30 years."

The claimant asked the Director to take notice of the fact that the defendant's Counsel's office banned smoking based on her protest in April 1992, and that a consultant's study of indoor air quality in the office recommended that smoking be prohibited. The study also suggested that ETS was partially responsible for "some of the recent illness and discomfort experienced

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